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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

WEST CONTRA COSTA UNIFIED
SCHOOL DISTRICT,

Plaintiff and Respondent,

v.

RDS ARCHITECTS,

Defendant and Appellant.

A106513

(Contra Costa County
Super. Ct. No. C03-01648)

Defendant RDS Architects (RDS) appeals from an order denying its motion to disqualify the law firm of Miller, Brown & Dannis (MBD or the law firm) from representing plaintiff West Contra Costa Unified School District (the district) in the district's action against RDS for breach of contract and professional negligence. RDS contends that MBD previously represented it in a substantially related matter and disputes the trial court's finding that it waived the alleged conflict of interest. We conclude the trial court did not abuse its discretion in denying the disqualification motion.

Factual and Procedural History

In early 1990, RDS entered into a contract with the district's predecessor to provide design services for the construction of a new school in Hercules, California. Because of funding difficulties, the project was put on hold for an extended period of time. In the mid-1990s, the project was reactivated, and at the request of the district, RDS redesigned the project. At that time, RDS became concerned that the district would not be able to pay for its services. RDS's business manager, Elizabeth Spencer,

contacted Marilyn Cleveland at MBD to help RDS and the district obtain additional construction funds from the state.

In March 1997, RDS and MBD entered into an agreement for professional services under which the law firm agreed to represent RDS “from March 1, 1997, through and including June 30, 1998, concerning the appeal of West Contra Costa Unified School District . . . to the State of California for additional compensation to reimburse [RDS].” Prior to entering into the agreement, Cleveland met with R. Don Spencer, the sole proprietor of RDS, and explained that because the law firm almost exclusively represents school districts, she could not do anything for RDS that would create a conflict with the district. Ms. Spencer assured Cleveland that the law firm would “merely be assisting the District in collecting funds from the State, an action that would be beneficial to both the District and RDS” RDS authorized the law firm to approach the district to seek the authority to represent RDS and the district jointly, and at RDS’s expense, to seek funds from the State for the project. In keeping with this discussion, the following waiver provision was included in the fee agreement: “In cases where a school district and a design professional providing services to the District are jointly represented, there exists a conflict of interest. Such conflict is caused because the interests of the District and the design professional are, or may become at some time in the future, different. Client acknowledges that this conflict is understood, but that nevertheless, client wishes Attorney to proceed with representation, and, further, waives any and all such conflicts (whether existing or potential) and agrees to hold Attorney harmless for any such conflict which now exists or arises during Attorney’s representation. Because a potential or actual conflict of interest may arise, Client understands that Attorney at it[s] option may withdraw from representation of Client, and Client agrees to accept such withdrawal of Attorney representation of Client as well as Attorney’s continued representation of District or any other party.”

MBD’s representation of RDS was terminated suddenly only two months later when, at a meeting between RDS and the district, Ms. Spencer threatened to sue the district if they were unsuccessful in securing additional funds from the State. Cleveland

immediately informed Ms. Spencer that the law firm could no longer represent RDS. Cleveland followed up their conversation with a letter terminating the law firm's representation of RDS and reiterating, "our firm cannot continue to represent RDS because of the potential for a conflict of interest with the West Contra Costa Unified School District. While an actual current conflict of interest does not exist, the nature of our firm's practice, which I described when we first met, makes even a potential conflict of interest a roadblock to our firm providing the full range of legal services to which RDS is entitled, including advising RDS on all its options and remedies."

Six years later, on July 1, 2003, after the school had been constructed, the district, represented by MBD, filed an action against RDS for breach of contract and professional negligence in the design and supervision of the school construction. The complaint alleges that "Defendant RDS . . . breached the Contract by inadequately performing their obligations under the Contract, including, but not limited to, providing inadequate and inaccurate designs and contract administration in the structural, plumbing, grading and site planning areas." The district's cause of action for professional negligence alleges, "Defendant RDS . . . breached their duty by failing to act with due care and in a reasonable manner and to meet the standard of care of a professional architect by failing: [¶] a. to provide complete, accurate, and adequate work plans and drawings; [¶] b. to adequately investigate site conditions; [¶] c. to timely procure permits; [¶] d. to timely respond to requests for information; [¶] e. to cooperate fully and provide revisions to the work plans in a timely fashion; [¶] f. to refrain from conduct that would unreasonably and/or unnecessarily impede, disrupt or interfere with completion of the Project."

On December 16, 2003, after filing its answer to the complaint, RDS moved to disqualify MBD from participating further in the litigation based on an alleged conflict of interest arising out of the law firm's prior representation of RDS. RDS argued that the law firm should be disqualified because RDS had a substantial prior relationship with MBD through which the law firm had received confidential information about RDS. The district argued that RDS had waived any conflict of interest, and MBD denied that it had received any confidential information about RDS relevant to the present litigation. After

a lengthy hearing on RDS's motion, the trial court tentatively denied the motion, but continued the matter for three weeks and provided RDS an opportunity to submit in-camera declarations demonstrating that relevant confidential information was actually passed from RDS to MBD.

At the subsequent hearing, the trial court determined that supplemental declarations submitted by RDS, which paraphrased confidential communications, were not appropriate for in camera inspection. When RDS refused to disclose the contents of the declaration to the district, the trial court excluded the evidence and adopted its tentative decision denying the motion. The court's written order provides, "[RDS] has not established by a preponderance of evidence that the earlier representation was 'substantially related' or that the waiver was invalid. The fee agreement contained an adequate explanation of the waiver." RDS filed a timely notice of appeal.

Discussion

"The authority to disqualify an attorney stems from the trial court's inherent power '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.' [Citation.] In reviewing a disqualification motion, we will uphold the trial court's decision absent an abuse of discretion." (*Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285, 1292-1293 (*Zador*)). "If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion." (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144.)

1. *The district's breach of contract and negligence claims are not substantially related to MBD's prior representation of RDS.*

"An attorney is required to avoid the representation of adverse interests and cannot, 'without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation

of the client or former client, the member has obtained confidential information material to the employment.’ ” (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 705, citing Rules Prof. Conduct, rule 3-310(E).) Where conflict arises from the successive representation of clients with adverse interests, “the courts have recognized that the chief fiduciary value jeopardized is that of client *confidentiality*.” (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.) “While a former client may seek to disqualify a former attorney from representing an adverse party by showing that the former attorney possesses confidential information adverse to the former client, a showing of actual possession of confidential information is not necessary. [Citation.] Instead, courts rely on the substantial relationship test: ‘ “When a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney or to subordinates for whose legal work he was responsible, the attorney’s knowledge of confidential information is presumed.” ’ ” (*Derivi Construction & Architecture, Inc. v. Wong* (2004) 118 Cal.App.4th 1268.) The substantial relationship test requires analysis of two variables: “(1) the relationship between the legal problem involved in the former representation and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation.” (*Jessen v. Hartford Casualty Ins. Co.*, *supra*, 111 Cal.App.4th at p. 709.) With respect to the second factor, the court should “ ‘ “examine the time spent by the attorney on the earlier cases, the type of work performed, and the attorney’s possible exposure to formulation of policy or strategy.” ’ ” (*Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223, 234.)

Here, although Cleveland directly represented RDS in the prior matter, the representation was remarkably short-lived and limited in scope. More importantly, the issues raised by the present claims do not overlap with those raised in MBD’s prior representation of RDS. (See *Santa Teresa Citizen Action Group v. City of San Jose*

(2003) 114 Cal.App.4th 689, 711 [“where the two representations involve the same general subject, disqualification is not required if the nature of the factual and legal questions posed are not similar”].) The scope of MBD’s prior representation of RDS as set forth in the agreement was expressly limited to seeking additional construction funds from the state on behalf of both the district and RDS. The present litigation, filed six years later, relates to design defects and RDS’s alleged failure to properly supervise the construction project. It is difficult to imagine what confidential information obtained in March 1997 could be material to RDS’s failure to supervise a construction project that was not begun until May 1999. Likewise, due to the different factual and legal questions relevant to the former representation, it does not appear that confidential information material to the current dispute would have been imparted to Cleveland in the ordinary course of the attorney-client relationship.

Contrary to RDS’s argument, its affirmative defense to the district’s complaint—that any alleged breach on its part is excused because the district first breached the contract by failing to pay for the design services—does not establish a material relationship between the present litigation and former representation. The district correctly rejects RDS’s characterization of the prior representation as a fee dispute. The prior relationship between MBD, RDS, and the district was not confrontational, but cooperative. The district and RDS were equally interested in having the state provide funds that would permit construction to proceed. In light of the limited nature of the prior representation, and the law firm’s express refusal to engage in any acts hostile to the district, it is unlikely that RDS would have disclosed confidential information to MBD in the normal course of that relationship. This conclusion is further supported by Cleveland’s statement that “[a]t no time did the representation of RDS include an effort to secure financial commitments from the District. . . . [¶] . . . [W]e did not discuss the propriety of RDS’ fees nor did we discuss impacts to the Project in relation to payment issues.” Accordingly, as the matters are not substantially related, there is no basis to presume that confidential information was disclosed by RDS.

Likewise, RDS failed to establish that confidential information was actually disclosed during MBD's prior representation of RDS. Cleveland expressly denies that her communications with RDS exceeded the scope of the representation as set forth in the agreement. Her declaration states further, "Quality of services by RDS was not the subject of my representation of RDS nor was it a matter discussed with me by RDS. . . . [T]he representation was limited to assisting RDS and the District with collection of funds from the State. No issues of RDS performance were raised by RDS or by the District. In reviewing my communications with RDS, I recall being informed about the general character of the Project, the type of work that RDS had performed to date, the amount due and outstanding from the District. This was fact-based information. Moreover, this same information was readily shared by RDS with the District." The vague statements in Mr. Spencer's declaration that he disclosed confidential information are insufficient to establish the actual transmission of confidential information. Although RDS was given the opportunity to present evidence of confidential communications for in camera review, RDS did not present any such evidence.¹ Accordingly, there is no basis to disqualify MBD from representing the district in the present litigation.

2. RDS waived the alleged conflict of interest.

Even assuming the existence of a conflict of interest in the current litigation, RDS expressly waived the conflict under the terms of the agreement it signed in 1997. As discussed above, RDS agreed to waive any conflict, existing or potential, that arose as a result of MBD's representation of both RDS and the district.

"An advance waiver of potential future conflicts . . . is permitted under California law, even if the waiver does not specifically state the exact nature of the future conflict. [Citations.] The only inquiry that need be made is whether the waiver was fully informed." (*Visa U.S.A., Inc. v. First Data Corp.* (N.D. Cal. 2003) 241 F.Supp.2d 1101, 1105 (*Visa*); see also *Zador, supra*, 31 Cal.App.4th at p. 1301.) The party urging

¹ RDS does not challenge the trial court's ruling that the supplemental declarations submitted by RDS were not appropriate for in camera review.

disqualification bears the burden of proving that “it was not fully informed about the consequences of its conflicts waiver when it signed the waiver,” and the opposing party must “demonstrate that it ‘communicated information reasonably sufficient to permit the client to appreciate the significance of the matter in question.’ ” (*Visa, supra*, 241 F.Supp.2d at p. 1106.) “Factors that may be examined include the breadth of the waiver, the temporal scope of the waiver (whether it waived a current conflict or whether it was intended to waive all conflicts in the future), the quality of the conflicts discussion between the attorney and the client, the specificity of the waiver, the nature of the actual conflict (whether the attorney sought to represent both clients in the same dispute or in unrelated disputes), the sophistication of the client, and the interests of justice.” (*Ibid.*)

Substantial evidence supports the trial court’s finding that RDS was adequately informed of the consequences of its waiver. The language of the agreement itself sets forth the potential for conflict between the district and RDS. Cleveland explained in no uncertain terms that her law firm would not take any actions that might be adverse to the school district. Ms. Spencer, as a member of a neighboring school board, undoubtedly understood the scope of the relationship and the potential conflicts that may arise, but chose to continue with the representation, assuring Cleveland that its representation of RDS would be in the best interests of both RDS and the district. Accordingly, there is no basis to reject the trial court’s finding that the waiver was knowingly and intelligently made.

Contrary to RDS’s assertion, the waiver is not ambiguous or unenforceable because actual joint representation of RDS and the district did not come to fruition. The references to joint representation in the waiver are consistent with the parties’ understanding that MBD would represent the interests of both RDS and the district so long as they did not conflict. There is no ambiguity in the language of the agreement and the evidence supports the conclusion that the Spencers’ fully understood the scope of the representation. The fact that the representation was terminated suddenly before services were performed to implement the joint representation does not render the waiver invalid.

There is no suggestion that joint representation was a condition to the enforceability of the waiver.

In light of the trial court's conclusion that the Spencers were fully informed when they signed the waiver, no second waiver was required prior to MBD's representation of the district in the present action. RDS does not dispute that State Bar Rules of Professional Conduct, rule 3-310(E), which governs successive representation, does not require an additional waiver if the prior waiver is fully informed. (*Visa, supra*, 241 F.Supp.2d at p. 1105.) RDS argues, however, that if we conclude the parties were jointly represented when the waiver was signed, a second waiver was required under rule 3-310(C)(2) before MBD could represent the district in the present action. Rule 3-310(C) provides in relevant part, "A member shall not, without the informed written consent of each client: [¶] . . . [¶] (2) Accept or continue representation of *more than one client* in a matter in which the interests of the clients actually conflict." (Italics added.) The italicized language, however, renders subdivision (C)(2) of rule 3-310 inapplicable. MBD did not continue to represent more than one party with conflicting interests in the same matter. MBD represented RDS, and perhaps the district, in contemplation of an appeal to the state for additional construction funds. That representation was terminated in 1997. Six years later, MBD agreed to represent only one party, the district, in the current action. Accordingly, the rule requiring additional written consent in joint representation situations when a potential conflict becomes an actual conflict is not applicable. (See *Zador, supra*, 31 Cal.App.4th at p. 1295.)

Finally, the fact that neither the agreement nor Cleveland explicitly advised the Spencers that confidential information might be disclosed does not render the waiver invalid. (*Visa, supra*, 241 F.Supp.2d at p. 1105 ["An advance waiver of potential future conflicts . . . is permitted under California law, even if the waiver does not specifically state the exact nature of the future conflict"]; *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 622 [Waiver of the consequences of potential conflict was not inadequate simply because neither the court nor the agreement undertook the impossible burden of explaining separately every conceivable ramification].) As discussed above, there is no

basis to conclude that confidential information was related to MBD. Accordingly, the asserted failure to advise RDS about the potential disclosure of confidential information is without consequence.

Disposition

The order denying RDS's motion to disqualify the district's counsel of record is affirmed. The district shall recover its costs on appeal.²

Pollak, J.

We concur:

McGuiness, P. J.

Parrilli, J.

² The district's request for sanctions is denied. RDS's limited failure to comply with California Rules of Court, rule 5.1, has not interfered with the orderly review of this appeal and provides no basis for sanctions.